Office-Supreme Court, U.S.
FILED
DEC 13 1965
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1965

No. 816

GOVERNMENT EMPLOYEES INSURANCE COMPANY, *Petitioner*

vs.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Government Employees Insurance Company, Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above entitled case on July 22, 1965. A petition for rehearing was denied September 16, 1965.

CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is printed in the appendix hereto, infra Appendix A is reported in 349 F.2d, 83.

JURISDICTION

The order and judgment of the Court of Appeals was entered July 22, 1965. The petition for rehearing was denied September 16, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTION PRESENTED

This action is based upon a written contract between the petitioner and one Crume. United States was not a party to the contract. Its terms provide that an insured must comply with all the terms of the contract before an insured may recover judgment against the petitioner.

The requirements of the Federal Tort Claim Act are in direct conflict with the insurance policy terms. A compliance with the mandatory provisions of the FTCA results in a failure by the United States to comply with the terms of the insurance policy.

The United States contends that since it was responsible for Crume's negligence in the use of his automobile it is an additional insured under the terms of said insurance contract. If so, *is the United States bound by the written exclusions and other terms of said policy; may it recover a judgment against the insurance company to reimburse it for its loss without complying to the written conditions precedent to a recovery as is required of any insured?*

STATUTES INVOLVED

28 U.S.C. 507 1346(b), 2402, 2674, 2679(a) (b) (c) and (e), and 2667. Appendix B.

STATEMENT OF THE CASE

Jurisdiction of the United States Court

One Price T. Crume, a ranch owner, was also employed by the United States. While in the course of his employment he was involved in an automobile collision while driving his private automobile. The occupants of the other automobile invoked the jurisdiction of the United States District Court for the District of New Mexico. They sought damages by reason of the negligence of Crume under 28 U.S.C. 1346(b), which court had exclusive jurisdiction of this action.

Assumption of liability by the United States

The United States Attorney appeared for and represented the defendant, the United States, at all times. At the time of pretrial conference the Uinted States Attorney entered into an agreement whereby the United States assumed liability for the damages suffered by the plaintiffs and stipulated that the United States would pay an agreed sum of money to the plantiffs without trial or without written consent of the petitioner.

The United States District Judge entered judgment against the United States in favor of the plaintiffs for the agreed sum.

Third party complaint

Prior to the time of said judgment the United States Attorney, on behalf of the defendant, the United States, filed a third party complaint against the petitioner contending that the United States was an additional insured

under a standard policy of liability insurance issued to Crume. The United States sought reimbursement or indemnity for any sum of money which the third party plaintiff would become liable to the plaintiffs for on account of the alleged negligence of Crume while driving his automobile for the United States.

Answer to third party complaint

Petitioner attached a copy of the policy of insurance which it issued to Crume to his answer and made it a part thereof. The answer and the policy, among other things, provided that petitioner would pay on behalf of the insured all sums which the insured would become legally obligated to pay as damages. The insured was defined to include the named insured and any person or organization legally responsible for the use of the automobile. It was expressly provided:

> "This policy does not apply: * * * to liability assumed by the insured under any contract or agreement."

The policy provided that any insured must comply with all the terms of the policy as conditions precedent to recovery under said policy against the petitioner.

Judgment against petitioner

Without any trial or other proceeding, the United States District Judge entered judgment in favor of the United States and against the petitioner on said third party complaint for the amount of money which the United States had agreed to pay the plaintiffs. Said judgment against the petitioner was entered July 22, 1964.

Proceedings in the Court of Appeals

The petitioner filed its notice of appeal September 18, 1964. By order of Court on October 26, 1964, the time for docketing the cause in the Court of Appeals was extended to December 15, for the reason that the Clerk of the District Court had not completed preparation of the record. Said case was docketed in the Court of Appeals on December 15, 1964. Judgment of the Court of Appeals in this case was entered July 22, 1965. The time for filing a petition for rehearing was extended by order of Court to August 25, 1965. Petition for rehearing was filed on August 20, 1965. The petition for rehearing was denied on September 16, 1965.

The lower court's decision

The Tenth Circuit affirmed the judgment of the District Court and stated:

> "The crux of the problem before us is whether the insurer intended and did cover the United States as an additional 'insured' when it defined the word 'insured' to include the named insured and 'any person or organization legally responsible for the use' of the automobile".
>
> "• • • The facts are not in dispute"

that the United States sought

> "• • • to recover from the insurer on the contractural obligation of liability to the United States • • •".
>
> "• • • The design of the Act was to characterize the United States as a private employer. • • • The

United States, therefore, is liable as a person, and concomitant with the liability is the right to be insured as a *private person* with unlimited coverage of the insurance policy here in issue''. (our emphasis)

''• • • Knowing full well that the named insured could not be sued for injuries and damages • • • *it must be assumed* that the insurer tacitly understood that *its requirements respecting jury trial, the right of trial by its own attorneys and the written permission to settle would not be applicable* when the suit would be brought *under the Federal Tort Claims Act.* When it renewed the policy the insurer knew, or should have known, that *such provisions were unenforceable with respect to the United States* as a person legally responsible for the use of the insured vehicle. It cannot now, therefore, rely on those requirements to defeat the rights of the United States as an insured under the policy''. (our emphasis)

''The pacesetters Rowley vs. United States, E.D. Utah 140 F.Supp. 295 and Irvin vs. United States, E.D.S.D., 148 F.Supp. 25, were decided in 1956 and 1957 respectively. In essence, they held that the United States was an insured under the clause, 'any person or organization legally responsible for the use' of the automobile''.

The Court said that *if* the company did not intend to acquiesce in those decisions and intended to escape that construction of the omnibus clause, same should have been eliminated after 1957.

''• • • The Federal Tort Claims Act equates the United States with a private person''.

Procedures under Statute and policy are in conflict

A mere reading of the statute and contract shows the meaning of each writing to be plain and clear.

The FTCA provides a complete plan for the handling of all claims for damages arising by reason of the negligence of a government employee. The United States District Court has exclusive jurisdiction. The trial must be to the Court without a jury. The United States must be represented by the Attorney General and the United States Attorney. These attorneys have authority to settle and compromise any claim. Appendix B.

The policy of insurance also sets forth how claims against any insured must be pursued. It provides that the insurance company shall defend an action. It may choose its own attorneys. The company may make such investigation, negotiation and settlement as it deems expedient. The liability assumed by the insured under any agreement is excluded. The insured must cooperate with the company and it may not voluntarily make any payment or assume any obligation. Whoever is the insured shall have no right of action against the company unless as a condition precedent the insured shall have fully complied with all the terms of the policy and the insured's obligation shall be fixed after an actual trial or by written agreement signed by the insurance company. Appendix C.

The mandatory procedures set forth in the statutes are in direct conflict with the requirement of the insurance contract. If the United States follows the statute, it violates all of the essential terms and conditions precedent set forth in the policy of insurance.

Court of Appeals mistakes the question

The Court of Appeals mistakenly stated that the crux of the problem is whether the petitioner intended and did cover the United States as an additional insured. The crux is whether the United States could and did comply with the terms and conditions precedent to a recovery of a judgment as an insured against the petitioner, and whether or not the voluntary assumption of liability by the United States was expressly excluded under the terms of the policy.

The Court below said the United States had the same right and obligations as a private person or private employer. The policy says that an insured may not recover from the insurance company if the insured has assumed liability. That is an express exclusion.

An employer of the named insured *may* be a third party beneficiary under the policy contract. If the United States and a private person have exactly the same rights and obligations, then under the decision of the lower court, any private employer may be reimbursed for any settlement he might make without the consent of the insurance company, whether it is reasonable or unreasonable!

The Court said that the insurer could not enforce its requirements respecting jury trial, right of trial by its own attorneys and written permission to settle by reason of the Federal Tort Claims Act. If that is true, then the government driver's law is in violation of the Fifth and Seventh Amendments to the Constitution of the United States, and the Act is in conflict with the decisions of this Court as hereinafter set forth.

REASONS FOR THE PETITION

New and Novel Question — Extensive Litigation

1. This case involves an important question of federal law which is new or novel because it has not been considered by this Court and there is no decision from any appellate court, except the Tenth Circuit case, which we ask this Court to review.

At present it is estimated that there are some one hundred cases pending in the various courts wherein the United States seeks reimbursement under an employee's automobile liability insurance policy, which is the exact question involved in this case. The aggregate demands involve a very large sum of money.

This question continues to arise because thousands of part-time and full-time employees of the United States are authorized to use their private and personally owned automobiles to perform services for the United States. Under the Federal Tort Claims Act, 28 U.S.C. 1346(b) and the 1961 amendment thereto, 28 U.S.C. 2679, there is now no right of action against an employee who was guilty of negligence while in the scope of employment by the United States. The United States is exclusively liable for injuries and damages thus incurred.

If a government employee wishes to protect himself in his personal use of the automobile, he must purchase liability insurance, as was done in this case. These insurance policies are private contracts between the individual owner of an automobile and an insurance company. The United States is not a named insured therein and is not a party to the contract.

If the employee's automobile is used exclusively in government service, there would be no need for insurance for the reason that the United States, by virtue of the Federal Tort Claims Act, has insured the employee against loss and has assumed any liability that the employee would have had prior to the adoption of the 1961 amendment to the Federal Tort Claims Act.

In the Public Interest

2. A determination of the question presented in this petition is of utmost importance to:

(i) The public.

(ii) The United States of America, particularly the Congress who is charged with fiscal problems, and the Department of Justice.

(iii) Government employees, including military personnel.

(iv) The insurance industry.

(v) The various United States Courts.

The claim now asserted, though a product of a law enacted by Congress, made no provision for indemnity. The Congress and not the courts had exclusive right to determine the fiscal policy. *United States vs. Gilman,* 347 U.S. 507, 98 L.Ed. 898, 74 S.Ct. 695.

It is most important to the Attorney General in the administration of the Department of Justice. He is charged with the duty of representing the United States of any

action where the United States is a defendant, a plaintiff or a third party plantiff.

The matter in dispute between the United States and the insurance companies will continue until it is determined whether the United States has a right over against an insurance company on an employee's personal insurance policy. Settlement of this question is in the public interest since it is likely to arise every time an employee in government service has an accident with his private automobile.

A decision by this court is of great importance to the insurance industry. *If insurance companies must pay* losses sustained by the United States under the FTCA *without the right to control the litigation* and must submit to the compromise settlements made by the Attorney General, the industry will be required to seek a substantial increase in premium income (perhaps 300%) to be charged to insureds who may use their automobiles in government service, or, if increased premiums cannot be obtained, the various insurance companies, to protect their own solvency, may be required to refuse to issue liability insurance policies to government employees.

It is important to part-time and full-time government employees and military personnel who may use their automobiles in the furtherance of government business to know whether or not they will be able to buy insurance, and, if so, whether the cost is prohibitive.

The determination of this question is of importance to the United States courts because of the crowded docket and the great volume of litigation now pending, which will continue until the question is decided. The determi-

nation of the question has affected the public interest because of all the foregoing reasons, and, further, as taxpayers and as insurance buyers the public will be interested to know whether it will have to bear the increased costs suffered by the insurance industry.

Violation of Constitution

3. The Fifth Amendment to the Constitution of the United States provides:

> "No person shall * * * be deprived of life, liberty or property without due process of law * * *".

The lower court's decision said that it must be assumed that the insurer's requirements respecting jury trial, right to trial by its own attorneys and written permission to settle would be unenforceable with respect to the United States. The opinion also said that the Federal Tort Claims Act equates the United States as a private person. Those rights are enforceable against a private person.

With regard to an insurer's obligations under a liability policy, *Traders and General Ins. Co., vs. Rudco Oil and Gas Co.*, 129 F.2d 621 (1942) said:

> "Its obligation to defend and to pay is primary and paramount; conesquently, its right to control the litigation is first and paramount, an essential part of which is the right to insist upon the cooperation of the assured, and the assured may not interfere by voluntary assumption of liability or by arbitrarily insisting upon settlement of the claims or suits."

Under certain circumstances the petitioner would have a choice of courts. The Federal Tort Claims Act provides

that Federal courts alone shall have jurisdiction. Under the lower court's decision it is unnecessary for the United States to cooperate with the petitioner and the latter does not have the right to investigate and make such settlements as it deems expedient. The decision destroys and takes away from the petitioner the exclusion which says there is no coverage for "• • • liability assumed by the insured under any contract or agreement". The Tenth Circuit opinion is in conflict with this court's opinions. In the case of *Lynch vs. United States,* 292 U.S. 571, 78 L.Ed. 1434, 54 S.Ct. 849, it is said:

> "The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a state or the United States • • •".
>
> "Contracts between individuals are impaired within the meaning of the Constitution whenever their right to enforce them by legal process is taken away or materially lessened".

Also, this Court, in *Louisville Joint Land Bank vs. Radford* 295 U.S. 555, 79 L.Ed. 1593, 55 S.Ct. 854 said that the change and increase in a mortgator's rights against a mortgagee without paying off a contracted debt "• • • is the taking of substantive rights in specific property • • •".

The Seventh Amendment

4. The lower court's decision has the effect of depriving the petitioner of a right to conduct the defense before a jury, in violation of the Seventh Amendment to the Constitution of the United States wherein it is said:

> "Jury trial in civil actions.—In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

This decision, in this respect, is in conflict with many decisions of this court wherein it has been said that the maintenance of the jury as a fact finding body occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care. There is as much reason for a jury trial in cases where the petitioner may be liable as in FELA cases. This is confirmed by Rule 38 of the Rules of Civil Procedure which says "the right to trial by jury is declared by the Seventh Amendment to the Constitution or as given by a Statute of the United States, shall be preserved to the parties inviolate."

Conflict Decision of this Court

5. The decision of the Court below is contrary to this court's interpretation of the rights of the United States and to the principles laid down by this court in the case of *U.S. vs. Gilman,* supra. The U.S. in that case argued that the right of indemnity, though not expressly granted by the FTCA, is to be implied, since a private employer had such right at common law. The 10th C.A. opinion presented that same argument. This Court in the *Gilman* case said that this is not an established type of liability as in an ordinary case, and that if the right of indemnity were granted it would mostly be brought only when an employee carried insurance. *This court said it*

could not fashion a rule whereby the U.S. could collect an indemnity against an insured employee and not against an uninsured employee.

Contrary to Intent of the Congress

6. In determining the intent of the Congress it is important to understand that the Congress over a period of years, and at the time it was studying and enacting the 1961 amendment to the FTCA, considered paying the premiums on liability insurance for employees and abandoned that thought as too expensive and adopted the law which makes the United States exclusively liable.

The Congress was fully advised as to the terms and conditions of a standard liability insurance policy. The Congress by the enactment of the FTCA, as amended, made it *impossible* for the United States to comply with the conditions precedent to recovery against an insurance company which issued a liability policy to an employee.

The Congress did not intend that the government should have a right of recoupment against anyone, including the employee's insurance company. The decision of the Court below is also contrary to the intention of the Congress.

> "The Congress could have expressly provided for indemnification of the United States by an employee's insuror. Failure to do so indicates a contrary intention. Gerard Trust Co. v. United States, 270, U.S. 163, 169 (1926)."

Myers vs. United States, D.C.N.D. Texas, 1965, 241 F.Supp. 515; *McCrary vs. United States vs. State Farm*

Automobile Liability Insurance Company, E.D. Tenn., 1964, 235 F.Supp. 33; *Uptagrafft vs. U.S.A.,* 1963, 315 F.2d 200; *Perez vs. United States,* D.C.S.D.N.Y., 218 F.Supp. 571; *1961 United States Code and Administrative News,* 2784-2791; Senate Report 87th Congress, Second Session August, 1961.

Conflicts and Other Appeals

7. There is direct conflict between the principles laid down in the case of *McCrary vs. U.S.* also there is a conflict between the decision of the United State District Court in the case of *Myers vs. United States,* 241 F.Supp. 515 and the Tenth Circuit Court of Appeals in our case. There is a direct conflict between these two courts on the issue now presented to this Court.

The *Myers* case is now on appeal, being No. 22830, in the United States Court of Appeals for the Fifth Circuit. In this connection the same question is being presented in another appeal to the Fifth Circuit, being case No. 22974, *United States vs. National Insurance Underwriters,* (S.D. Miss.) unreported decision July 7, 1965. The third case pending on appeal before the Fifth Circuit is No. 22677, *Barker vs. United States,* 233 F.Supp. 455 (N.D. Ga.)

Appendix D is *McCrary vs. U.S.* supra.

Tenth Circuit's decision is in conflict with statutory law

8. The lower court's decision is in conflict with the statutory law of many, if not all, of the states of the Union. Most states have what is called a Safety Responsibility

Act which provides that a motor vehicle liability policy shall include:

> "Said policy shall insure the person named therein and any other person using or responsible for the use of said motor vehicle with the express or implied permission of said insured".

This is a statutory "omnibus clause". These statutes have the effect of making the foregoing requirement a part of every policy issued, whether or not the language actually appears in the policy.

The opinion below said that in order to avoid liability the insurance company should have eliminated the omnibus clause some time between 1957 and 1962. If that clause had been deleted from the policy, that would be ineffectual because of the statutory law of the various states.

In the recent case of *Jenkins vs. Mayflower Insurance Exchange,* 93 Ariz., 287, 380 P.2d 145, (March 1963), the court refused to honor a restrictive endorsement purporting to avoid coverage when the insured vehicle was operated by a member of the armed forces. That Court followed the case of *Wildman vs. Government Employees Insurance Company,* 48 Calif., 2d 31, 307 P.2d 359 (1957) holding that the omnibus clause found in the financial responsibility law was a part of every policy of motor vehicle liability insurance.

In addition to the statutory law, it is helpful to note that the United States Department of Defense in regulations (directive April 15, 1964) governing military and civilian personnel requires that each person owning an automobile must purchase an insurance policy which:

> "Provides bodily injury and property damage coverage for all drivers authorized by the named insured to operate the vehicle. Military endorsements, excluding persons other than the named insured, whether in the military or not, are not acceptable".

It may be that other departments of the government have similar requirements.

In addition to the statutory requirements, the omnibus clause is important to each individual who owns and operates an automobile. In the event he uses that vehicle and renders either gratuitous services or services for hire to a neighbor or another person at times when he is not employed by the United States, the extended coverage to any person who is responsible for the insured's negligence is important to him because both the employee and the employer are then covered by the same policy and there is no conflict between the employer and the employee. This court should correct the impression of the lower court that the omnibus clause was made expressly for the benefit of the United States as that opinion intimates. The United States and any other additional insured, is merely a third party beneficiary of the benefits of the policy providing that any additional insured brings himself within the terms of the policy and complies with its terms.

The point is that even if the United States is considered, in the first instance, as coming within the terms of the omnibus clause as an additional assured, the lower court's decision overlooks the fact that the United States in this case, and in all cases, did not and cannot comply with the terms of the policy to recover a judgment against the insurance company.

This Court's supervision imperative

9. We believe this court will consider it important not to let the Tenth Circuit decision stand as law and precedent for scores of cases now pending and for the many more which will be filed. The decision says that the express conditions of the policy are unenforceable against the United States by reason of the Federal Tort Claims Act. If this construction is correct, then the Federal Tort Claims Act is in violation of the Fifth and Seventh Amendments to the Constitution of the United States.

The decision not only destroys the express terms of a private contract, but prevents persons from exercising their constitutional right to freely contract. The principal purpose of this contract was to protect the named insured, Mr. Crume. All other provisions were for his incidental benefit.

The lower court has misled itself, it said that the crux is whether the insurer intended to cover the United States as an additional insured. The insurance company did not intend to cover and did not grant insurance to any one who would not or could not comply with the policy terms and the conditions precedent to a recovery against the petitioner.

Assuming the broadest possible meaning to the omnibus clause does not say that anyone who fits that description would automatically be entitled to a judgment against the insurance company without compliance with the contract terms. That is the sense of the court's opinion.

All but two of the District Courts which have approached the present problem have fallen into the same

error, namely, they consider the presence of the omnibus clause in each policy as being decisive of the case. The other terms, provisions, conditions and exclusions are generally ignored. Most decisions have cited *Rowley vs. U.S.*, supra and *Irvin vs. U.S.*, supra. The Tenth Circuit Court of Appeals has fallen into a similar error and has stated those two cases are the "pacesetters." Those cases were decided when both an employee and the United States could be sued for the employee's negligence. Since that time the 1961 Amendment has made the United States exclusively liable. Those courts who now cite the *Rowley* and *Irvin* cases must treat the 1961 Amendment as being meaningless.

An examination of the *Rowley* opinion will show that the heart of the case is where the judge says that there is no reason why insurance companies should not be liable. (1) It appears that the insurance company probably agreed to the settlement. (2) The court said there was no showing that the policy was unenforceable. (3) And there was no showing that the obligations of the insured were not fully performed. Those things might be a sufficient explanation for the judge's opinion. (4) The most important part, it was left open to the parties, in the future, to argue, whether the U.S. could recover. It was not a final decision.

The *Irvin* case adds nothing. (1) It quotes and approves of the *Rowley* opinion. (2) It then makes serious error which deserves this court's supervision. The opinion says that:

> "The no action clause is directly opposed to Rule 14 • • • the no action provision of the policy is neither helpful to the third party defendant, to the courts, nor

generally is it in the interest of public welfare. Its object is to put weights on the already too slow feet of justice".

The foregoing in itself is reversible error. The Rules of Civil Procedure do not:

"abridge, enlarge or modify the substantive rights of litigants". *Moore's Federal Practice,* 14.03.

The judge also said that the Federal Tort Claims Act should not be construed as an intention to relieve a government employee of all legal and moral responsibility. The 1961 Amendment makes that inapplicable to the present.

The U.S. may not change the terms of the contract

10. The United States was not a party to the policy contract with the petitioner. The policy provides:

"Nor shall the terms of the policy be waived or changed except by endorsement issued to form a part of the policy, signed by an authorized representative of the company."

The foregoing is the only way that Crume could have changed the policy of insurance. Certainly the United States could not change the terms of the policy and force the petitioner to waive any of the terms of the policy in the absence of a wirtten agreement. The insurance company is not estopped to defend on the ground that the United States has not complied with the terms of the policy.

"The parties to an insurance contract may fix the terms as they see fit and they will not be re-written by the court." Elsey vs. Prudential Insurance Company, 262 F.2d 432, 10th C.A. 1958.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

December, 1965

Respectfully Submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

May Term 1965

Before MURRAH, Chief Judge, LEWIS, Circuit Judge, and KERR, District Judge.

KERR, District Judge.

This is an appeal by Government Employees Insurance Company from a judgment entered by the Uinted States District Court for the District of New Mexico determining that Appellant was liable to the United States for the amount of the judgment rendered against the United States in an action brought pursuant to the Federal Tort Claims Act. The crux of the problem before us is whether the insurer intended to and did cover the United States as an additional "insured" when it defined the word "insured" to include the named insured and "any person or organization legally responsible for the use" of the automobile.

The facts are not in dispute. Otto and Christine Nilson sustained injuries from a collision between a vehicle owned and operated by Otto Nilson and a truck owned and operated by Price T. Crume, the named insured. Their original complaint against Price T. Crume was dismissed and a First Amended Complaint was filed, which made the United States of America the sole defendant. Upon motion of the United States, the District Court ordered that a Third Party Complaint be filed against the Government Employees Insurance Company. The District

Court expressly found that Price T. Crume was negligent in the operation of his vehicle; that at the time of his negligent acts and at the time of the accident, he was an employee of the United States and was acting within the scope and course of his employment; and that the automobile liability insurance policy issued by the Government Employees Insurance Company to Price T. Crume was in full force and effect at the time of the collision. The Court further found that at the time of the accident the United States was a person or organization legally responsible for the use of Mr. Crume's automobile and that the United States was an "insured" within the terms of the liability policy. The District Court concluded as a matter of law that the United States was an additional insured and had properly asserted its rights as an insured under the policy by way of a Third Party Complaint. Judgment was thereupon entered that the plaintiffs recover from the United States of America the sum of $15,000, that the Intervenor, Phoenix Assurance Company of New York, recover from the United States the sum of $750 for property damages, and that the United States recover from the third party defendant, the Government Employees Insurance Company, the sum of $15,750.00.

We find no fault with the trial court's Findings of Fact and Conclusions of Law. The United States is not claiming indemnity against the Government Employees Insurance Company. It seeks, rather, to recover from the insurer on the contractual obligation of liability to the United States as an insured who has been found legally obligated to pay the claims of persons injured from the negligence of a government employee in the course of his government employment.

Appellant claims that the indemnity insurance policy issued to Crume was not intended to protect the United States; that the United States is not "a person or organization" within the meaning of the policy and therefore is not an insured under the policy of insurance. Appellant further claims that it has a valid defense against the claim of the United States for its failure to comply with the conditions precedent to liability under the policy of insurance, namely, Appellant's right to have sole control of all phases of the defense of any claim against an insured, including the right to use its own attorneys and to demand a jury trial. Appellant denies liability to the United States for the further reason that the judgment in favor of the plaintiffs against the United States was entered upon the stipulation and agreement between the plaintiffs and the United States without the written agreement of the appellant contrary to the requirements of the policy.

Appellant's position is not supported by the facts and is contrary to the applicable judicial pronouncements which we consider legally sound.[1] On the policy, the named insured's occupation was given as "Gov't Hunter", and the purposes for which the truck was to be used were listed as "Pleasure and Business". The term "insured" was defined as the named insured and "any person or organization legally responsible for the use" of the automobile. The facts in this case, the conditions under which the policy was issued, and the provisions of the Federal Tort Claims Act combine to dictate the conclusion that

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[1]The Trial Judge relied on **Irvin v. United States**, D. So. Dak., 148 F.Supp. 25; **Nistendirk v. United State v. M.F.A. Mutual Insurance Company**, W.D. Mo., 225 F.Supp. 884; and **Vaughn et al v. United States v. Tennessee Farmers Mutual Insurance Company**, W.D. Tenn., 225 F.Supp. 890.

the United States is an additional insured and a "person" under the policy definition of the term "insured".

The purpose of the Federal Tort Claims Act was "to render the government liable in tort *as a private individual* would be under like circumstances". Richards et al v. United States et al., 369 U.S. 1, 6 (1962), underscoring added; 28 U.S.C. Sections 1346(b) and 2674. The design of the Act was to characterize the United States as a private employer. Congress intended to put an end to the many private claims with which it had been burdened and to do so it shed the cloak of sovereignty and entered the market place, so to speak. The United States, therefore, is liable as a person, and concomitant with that liability is the right to be insured as a private person within the unlimited coverage of the insurance policy here in issue.

The Government Employees Insurance Company issued its liability policy to Price T. Crume in February 1961, and on February 13, 1962, it was renewed for another year. Section 2679 of Title 28, U.S.C., was amended on September 21, 1961, to take effect six months after its enactment, or in March 1962.[2]. The collision occurred in June 1962. When the policy issued to Price T. Crume was renewed, therefore, the Government Employees Insurance Company was bound to know that only the United States was suable for the torts of its employees committed within the scope of their employment. The Company's intention to insure the United States is im-

[2]28 U.S.C. 2679(b) as amended reads as follows: "The remedy by suit against the United States as provided by section 1346(b) of this title for damage to property or for personal injury, including death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim."

plicit in its conduct. By insuring a government employee for the use of his vehicle on government business, the Government Employees Insurance Company obligated itself to pay on behalf of the United States as an insured all sums which the United States would become legally obligated to pay as damages sustained by any person caused by accident and arising out of the ownership, maintenance or use of the government employee's automobile.

Knowing full well that the named insured could not be sued for injuries or damages sustained from his negligence while performing his duties as a government hunter, it must be assumed that the insurer tacitly understood that its requirements respecting jury trial, the conduct of the trial by its own attorneys, and the written permission to settle would not be applicable when suit would be brought under the Federal Torts Claims Act. When it renewed the policy, the insurer knew or should have known, that such provisions were unenforceable with respect to the United States as the person legally responsible for the use of the insured vehicle. It cannot now, therefore, rely on those requirements to defeat the rights of the United States as an insured under the policy.

The pacesetters, Rowley v. United States, E.D. Utah, 140 F.Supp. 295, and Irvin v. United States, supra, were decided in 1956 and 1957 respectively. In essence they held that the United States was an insured under the clause, "any person or organization legally responsible for the use" of the automobile. Retaining such words in its policy insuring a government employee, the Government Employees Insurance Company acquiesced to the

prior decisions. Had it intended to escape such construction of the so-called omnibus clause and to divest itself of an obligation to the United States as an insured, it had ample opportunity to do so between 1957 and 1961 or 1962. It must be presumed that the appellant, by continuing to use the words, "persons or organization legally responsible for the use" of the automobile, understood their meaning to be consonant with the repeated judicial interpretations. Wachovia Bank and Trust Company v. Manufacturers Casualty Insurance Company, M.D. No. Car., 171 F.Supp. 369 (1959).[3] The respectable authorities accumulated since the Rowley and Irvin decisions have not deviated from the rationale that policies specifying the governmental occupation of the named insured and the use of the automobile for business imply an intent to insure the United States.[4]

The Federal Tort Claims Act equates the United

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[3]44 C.J.S. "Insurance" Sec. 293, Pages 1154-1155: "Terms used in a policy which have by prior judicial decisions been given a definite meaning, will be regarded as being used in view of such established construction and be governed thereby; and if the insurer continues to issue, without change, policies, clauses of which have been judicially construed, it will be considered as issuing them with that construction placed on them, even though such construction violates the literal sense of the words used."

[4]**Nistendirk v. United States of America v. M.F.A. Mutual Insurance Company,** W.D. Mo., 225 F.Supp. 884 (1964); **Vaughn et al. v. United States of America v. Tennessee Farmers Mutual Insurance Company,** W.D. Tenn., 225 F.Supp. 890 (1964); **Patterson v. United States of America, et al. v. State Farm Mutual Automobile Insurance Company,** E.D. Tenn., 233 F.Supp. 447 (1964); **Barker v. United States of America v. National Insurance Underwriters-National Associated Underwriting Company,** N.D. Ga., 233 F.Supp. 455 (1964); **Gahagan v. State Farm Mutual Automobile Insurance Company and United States of America,** W.D. La., 233 F.Supp. 171 (1964); and the following unreported decisions: **Chatham v. Hunt** and **The United States of America v. National Insurance Underwriters,** M.D. Ga., 1964; **Davenport v. United States of America v. Farmers Mutual Automobile Insurance Company,** S.D. Iowa, 1964; **Town v. United States of America v. Allstate Insurance Company,** S.D. Cal., 1964; **Gabriel v. United States of America v. Virginia Farm Bureau Mutual Insurance Company,** W.D. Va.; **Helms v. United States of America v. State Farm Automobile Insurance Company,** W.D. No. Car., 1963.

States with a private person. The Government Employees Insurance Company, itself, wrote the insurance policy and is bound by its own language consistent with prior judicial construction thereof. It must now fulfill its obligations to the United States of America as an insured and assume its contractual liability under the policy.

In view of the meaning attributed to the statute and the insurance policy, the various other contentions of Appellant require no discussion. Suffice it to say that no additional risk is hereby imposed on the Government Employees Insurance Company, and no intrusion is made on its constitutional rights.

Affirmed.

APPENDIX B

STATUTE INVOLVED

The Federal Tort Claims Act, 62 Stat. 933, 982, as amended, 28 U.S.C. 1346(b), 2671 *et seq.*, provides in pertinent part as follows:

28 U.S.C. 1346.

• • •

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands shall have exclusive jurisdiction of civil actions on claims against the United States for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

• • •

28 U.S.C. 2402. *Jury trial in actions against United States*

Any action against the United States under section 1346 shall be tried by the court without a jury, except that any action against the United States under section 1346(a)(1) shall, at the request of either party to such action, be tried by the court with a jury.

• • •

28 U.S.C. 2674. *Liability of United States*

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

• • •

28 U.S.C. 2677. *Compromise*

The Attorney General, with the approval of the court, may arbitrate, compromise, or settle any claim cognizable under section 1346(b) of this title, after the commencement of an action thereon.

• • •

28 U.S.C. 2679. *Exclusiveness of remedy*

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(b) The remedy by suit against the United States as provided by section 1346(b) of this title for damage to property or for perosnal injury, including death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the

employee or his estate whose act or omission gave rise to the claim.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d) Upon a certification by the Attorney General that the defendant employee was acting within the scope of his employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place wherein it is pending and the proceedings deemed a tort action brought against the Uinted States under the provisions of this title and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning

of subsection (b) of this section is not available against the United States, the case shall be remanded to the State court.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.

APPENDIX C

The policy of insurance between the Petitioner and Price T. Crume, the insured provides that the Petitioner

"Agrees with the insured, named in the declarations made a part hereof, in consideration of the payment of the premium and in reliance upon the statements in the declarations and subject to the limits of liability, exclusions, conditions and other terms of this policy:"

• • •

"I. Coverage A—Bodily Injury Liability

"To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person, caused by accident and arising out of the ownership, maintenance or use of the automobile."

• • •

"II. Defense, Settlement, Supplementary Payments

"With respect to such insurance as is afforded by this policy for bodily injury liability and for property damage liability, the company shall:

(a) defend any suit against the insured alleging such injury, sickness, disease or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the company may make such investigation, negotiation and settlement of any claim or suit as it deems expedient;"

• • •

"III. Definition of Insured.

"(a) With respect to the insurance for bodily injury liability and for property damage liability the unqualified word 'insured' includes the named insured and, if the named insured is an individual, his spouse if a resident of the same household, and also includes any person while using the automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or such spouse or with the permission of either."

• • •

"EXCLUSIONS

"This policy does not apply: • • • (b) under coverages A and B, to liability assumed by the insured under any contract or argeement." • • • •

• • •

"CONDITIONS

"7. "Action Against Company, coverages A and B
No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company."

• • •

"18. "Assistance and Cooperation of the Insured. The insured shall cooperate with the company and, upon the company's request, shall attend hearings and

trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of the accident."

• • •

"22. "Changes. Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this policy or estop the company from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part of this policy, signed by an authorized representative of the company."

APPENDIX D

McCrary vs. United States, D.C.E.D. Tenn., 1964, 235 F.Supp. 33.

"NEESE, District Judge.

The plaintiff McCrary brought this action in tort against Frank X. Kuhn,[1] alleging the diverse citizenship of the parties and the jurisdictional amount, 28 U.S.C. § 1332(a) (1). Damages are claimed for personal injuries and loss of property allegedly caused by the negligent or wrongful act or omission of Mr. Kuhn, resulting from the operation of a motor vehicle. After the defendant had answered, a motion was filed by the United States attorney, averring that the Attorney General of the United States had certified that, at the time of the incident out of which this action arose, the defendant Kuhn was acting within the scope of his employment under a contract with the Architect of the Capitol for personal services, that the plaintiff's remedy was by action against the United States as provided by 28 U.S.C. § 1346(b), and that such remedy was exclusive. This motion was granted, and the United States was substituted for Mr. Kuhn as the party defendant herein. 28 U.S.C. § 2679(b) and (c) and 1346 (b). The Attorney General is now defending this action, 28 U.S.C. § 2679(c) and is authorized to compromise or settle the plaintiff's claim, 28 U.S.C. § 2679(e), infra.

After the United States was substituted as the dedendant herein, the United States attorney for this District sought permission at the pretrial conference to

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[1]Incorrectly designated in the complaint and summons as "Frank X. Kutin."

implead Mr. Kuhn's automobile liability insuror, State Farm Mutual Automobile Insurance Company of Bloomington, Illinois (hereinafter referred to as State Farm), as a third-party defendant. Rule 14(a), Federal Rules of Civil Procedure. It was asserted that the national sovereign was an "insured" under a policy of automobile liability insurance issued by State Farm to Mr. Kuhn and in force at the time of the automobile accident involved herein. The Court was disposed initially to refuse permission, on the theory that State Farm was relieved of liability by 28 U.S.C. § 2679 which placed any liability exclusively on the federal government. Gipson v. Shelley, D.C. Tenn. (1963), 219 F.Supp. 915. However, on the representation of counsel for the sovereign that this Court had not considered and passed on the precise question to be presented by the proposed third-party complaint, the motion was granted on the authority of Irvin v. United States, D.C.S.D. (1957), 148, F.Supp. 25.[2] State Farm has now moved for a dismissal of the third-party complaint on the ground that a cause of action is not stated against it on which relief could be granted. Rules 14(a) and 12(b)(6) Federal Rules of Civil Procedure.

The only provision found in Mr. Kuhn's policy with the third-party defendant under which it is, or may be, liable to the defendant United States for all or part of the plaintiff's claim in this action, is as follows:

> "• • • (T)he unqualified word 'insured' includes (1) the named insured, and also includes • • • (3) any other person while using the owned automobile, pro-

[2]Irvin, supra, cited **Rowley v. United States**, D.C. Utah (1956), 140 F.Supp. 295, in which Judge Christenson had resreved final judgment on the liability of the federal employee's automobile liability carrier until following any argument on the carrier's motion to dismiss the third-party complaint.

vided'' etc. ''and (4) under Coverages A and B any person or organization legally responsible for the use thereof by an insured defined under the three subsections above.''

Mr. Kuhn is the named insured in this policy and owned the insured vehicle. Coverages A and B of the policy protect an insured against liability for bodily injury and property damage, such as the plaintiff claims to have sustained in this action. The question for determination, then, is whether the United States has a right of action against the automobile liability carrier of its employee Kuhn which would permit it to be indemnified or exonerated if the plaintiff McCrary is successful in holding the defendant United States liable under the Tort Claims Act for the negligence of its said employee.

Actions not specifically provided for in the Tort Claims Act, have been allowed where courts were dealing with ''* * * an established type of liability, which was within the broad sweep of the claims for which the United States had agreed to stand liable. * * *'' United States v. Gilman (1954), 347 U.S. 507, 74 S.Ct. 695, 98 L.Ed. 898, 901. Undoubtedly, the United States may be sued as as a third-party defendant for contribution claimed by a joint tort-feasor, although no specific provision of the Act provides for such actions. United States v. Yellow Cab Co. (1951), 340 U.S. 543, 71 S.Ct. 399, 95 L.Ed. 523. And where the ship's service officer in charge of a specific business operation at the United States Merchant Marine Academy was issued a policy, not identifying by personal name, any of those insured, but naming by positions the incumbents of supervisory offices and adding as additional insured any other superior administrative authority, the

United States, which owned and operated the Academy, was "an additional insured" and could maintain a third-party action against the indemnitor when the United States was sued under the Tort Claims Act. Grant v. United States, C.A.2nd, 271, F.2d 651.

[1] The Grant case, supra, seems to have been decided primarily on the premise that the federal government's representatives and its insurance carrier had made a "* * * studied * * *" effort to insure both the United States and all its pertinent officials concerned with the operation of a commercial establishment at one of its installations. Where there is ambiguity in a contract, the practical construction placed on it by the parties, of course, is of controlling importance. Hawkeye Casualty Co. v. Rose, C.A.8th (1950), 181 F.2d 157[4].

[2] The issuance date of the policy now under consideration at this bar was May 15, 1962. This date was approximately 60 days following the effective date of the 1961 amendments to 28 U.S.C.A. § 2679. The general effect of these amendments was to make the remedy of a tort claimant for any tort action arising out of the operation of a motor vehicle by a government employee who was acting within the scope of his governmental employment, exclusively against the United States, whether the vehicle was owned by the soverign or by its employee. Gipson v. Shelley, supra. This change in the applicable law lends added emphasis to the intention of the insuring and insured parties.

Several district courts, including two in the Sixth Circuit, have held that automobile liability policies containing language identical with, or similar to, that in the

policy issued by State Farm to Mr. Kuhn, operated to give the United States a cause and right of action against insurors of employees of the federal government. Rowley v. United States, supra; Irvin v. United States, supra; Nistendirk v. United States v. MFA Mutual Insurance Company, D.C.Mo. (1964), 225 F.Supp. 884, 885-886[3]; Vaughn v. United States v. Tennessee Farmers Mutual Insurance Company, D.C.Tenn., 225 F.Supp. 890, 891[1];[3] Patterson v. United States, et al. v. State Farm, etc., D.C.Tenn. (1964), 233 F.Supp. 447.[4]

The decisions from the Missouri and Tennessee jurisdictions, supra, were decided following the 1961 amendments to the Tort Claims Act [esp. 28 U.S.C. § 2679], but all of them cite Irvin v. United States, supra, an unappealed decision of five years before on which the federal government seems not to have relied in the intervening period.

While the language is dicta, the Court of Appeals for the Fourth Circuit, since the enactment of the pertinent amendments, supra, has observed that "• • • (t)hese amendments, in effect, substitute the liability of the United States exclusively for that of its employees operating motor vehicles within the scope of their employment. • • •" [at page 202, fn. 1], and that "• • • (t)he express purpose of the amendments 'is to provide a method for the assumption by the Federal Government of responsibility

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[3]In the Vaughn case from the Western District, opinion by Judge Brown, the automobile liability policy was issued to the government's mail carrier to be used for both business and pleasure and recognized that the insured would use his automobile on the business of the United States. No such consideration is found in Mr. Kuhn's policy with State Farm, herein.

[4]My colleague, Judge Wilson, was apparently not aware that Judge Brown had revised his original opinion in Vaughn with reference to the interlocutory nature of this Court's earlier action in the case at bar as regards the third-party complaint.

for claims for damages against its employees arising from the operation by them of vehicles in the scope of their Government employment.' Behind it is the desire to protect the government driver from the ever-present danger of personal liability and to relieve him of the expense of supplying private liability insurance. Senate Report, 87th Congress, 2d Sess. (Aug. 1961), U.S.Code Cong. & Adm. News, p. 2784.'' Uptagrafft v. United States, C.A. 4th (1963), 315 F.2d 200, 204.

Supsections (a) and (b) of 28 U.S.C. § 2679, as amended in 1961, provide that the remedies provided for claims which are cognizable under 28 U.S.C. § 1346 (b) are exclusive not only against the employee or his estate, but exclusive generally. The reason for this is clear enough, viz., ''• • • The policy announced in the amendments had been a matter of great concern to Congress and other governmental bodies. Similar legislation was passed in 1960 but was vetoed because of an objectionable provision that does not appear in the present amendments. • • •'' Uptagrafft v. United States, supra, [12] at page 204. Bills to provide governmental indemnification for the drivers of vehicles on government business or to provide liability insurance to such drivers at no expense to them had been discarded in favor of the statute eventually passed. Perez v. United States, D.C.N.Y. (1963), 218 F.Supp. 571, 573[2]; see also Stephan v. Madison, D.C.N.Y. (1963), 223 F.Supp. 256, 258. Had the Congress intended to permit the United States to be indemnified or exonerated in actions under the Tort Claims Act, as amended in 1961, it could have made its purpose clear, and its failure to do so indicates a contrary intention. Girard Trust Co. v. United States (1926), 270 U.S. 163, 169, 46 S.Ct. 229, 70 L.Ed. 524, 528.

[3] Subsection (c) of the amended section imposes on the Attorney General the mandatory duty of defending this action, Stephan v. Madison, supra, 223 F.Supp. at page 259[2], and subsection (e) thereof authorizes the Attorney General to compromise or settle it. Notwithstanding, counsel for the defendant United States is now in the anomalous position of insisting that the third-party defendant is required by its contract with Mr. Khun to "* * * defend in defendant's name and on its behalf any suit against it alleging injury covered by the policy and seeking damages on account thereof * * *", Paragraph V, page 2, third-party complaint; yet, the "insured" is required in the contract with State Farm to assist and cooperate with the third-party defendant and specifically may not "* * * make any settlement, assume any obligation of incur any expense * * *" in connection with claims under the policy. Policy conditions, No. 4. The third-party defendant is obligated by contract to defend this action for the insured, and if the United States is "* * * an insured * * *" thereunder, the third-party defendant is bound by contract to defend the United States and to pay the losses incurred to the extent of the limits of its policy. The obligation of the third-party defendant to defend its insureds and to pay any judgment rendered is primary and paramount; "* * * consequently, its rights to control the litigation is first and paramount * * *." Traders & General Ins. Co. v. Rudco Oil & Gas Co., C.A. 10th (1942), 129 F.2d 621[3, 4], 142 A.L.R. 799.

[4] Pretermitting the question of any interference with the inter sese contractual rights of the parties to the policy by the enactment of these amendments, it is evident to the Court that the Congress did not contemplate giving the United States a right of action, even where the sover-

eign has a cause of action, to recoup its losses resulting from claims under the Tort Claims Act. Apparently, the Congress intended that the United States would bear the full brunt of the fiscal responsibility in this situation. It gave the United States no right of indemnity against its negligent employees. Gilman v. United States, supra. And this Court can find no right of indemnity against the insurors of its employees. See Gipson v. Shelley, supra, quoted from in Stephan v. Madison, supra. As was wisely said by Mr. Justice Douglas in Gilman, supra: "• • • (T)he claim now asserted, though the product of a law Congress passed, is a matter on which Congress has not taken a position. It presents questions of policy on which Congress has not spoken. The selection of that policy which is most advantageous to the whole involves a host of considerations that must be weighed and appraised. That function is more apropriately for those who write the laws, rather than those who interpret them." United States v. Gilman, supra, 347 U.S. at pages 511-512, 74 S.Ct. at pages 697-698, 98 L.Ed. at pages 902-903.

[5] The concept of indemnity underlies all, but life, insurance policies; and, under the common law, in order to render a judgment against the indemnitee binding on the indemnitor, the defendant was required to notify the indemnitor of the action and offer the indemnitor control of the defense as to the merits of the defendant's liability. Municipal Serv. R. E. Co. v. D. B. & M. Holding Corp., C.A.N.Y. (1931), 257 N.Y. 423, 178 N.E. 745, 78 A.L.R. 323, 325-326. If the United States is deemed an "insured" on the theory that it is a "person or organization legally responsible for the use of" his automobile by Mr. Kuhn, then State Farm is entitled to control the defense of the sovereign in McCrary's Tort Claims Act claim." 28 U.S.C.

§ 2679, as amended in 1961, precludes the Attorney General's relinquishing control. Stephan v. Madison, supra. It can only be assumed from this state of matters that the Congress intended to give the United States no right of action against the automobile liability insuror of its employees, but that it intended that the United States would pay judgments under the Act without reimbursement from anyone. Otherwise, there is interference with State Farm's contractual reservation of the right to "• • • make such investigation, negotiation and settlement of [this] claim or suit as it deems expedient. • • •"

The only situation this Court can anticipate in which such a paradox could properly arise is where an "insured" under a policy of automobile liability insurance also is the sovereign. "• • • Here the United States is the [third]-party plaintiff to the suit. And the United States has power at any time to create the liability. The only question is which organ of the Government is to make the determination that liability exists. That decision • • •is in this instance for Congress, not for the courts. Until it acts to establish the liability, this Court and others should withhold creative touch. • • •" United States v. Standard Oil Co. (1947), 332 U.S. 301, 67 S.Ct. 1604, 91 L.Ed. 2067, 2076. If the Congress has decided that the United States should bear the full cost of the negligent acts of its employees under circumstances presented by this action, the adoption of the procedure invoked by counsel for the United States herein would shift invariably the cost to its employees' insurors.

Even though stated in a different context, prior to the enactment of the Federal Tort Claims Act when the sovereign immunity of the United States had not been

waived as to tort claims, this Court is of the opinion that Mr. Justice Blandin was eminently correct when he stated for the New Hampshire Supreme Court:

> "* * * Obviously the government is not a person under our law. * * * Nor is it believed it could be called an organization. * * * Certainly 'organization' is not commonly employed in speaking of the United States. Since the policy is held to mean what a reasonable person in the position of the insured would expect * * *, it seems that this contention of the plaintiff is without merit." Farm Bureau Mut. Automobile Ins. Co. v. Manson (1947), 94 N.H. 389, 392, 54 A.2d 580, 583.

This Court is of the further opinion that 28 U.S.C. § 2679 gives the United States no right of action against the third-party defendant, and accordingly that the third-party complaint herein fails to state a cause of action on which relief can be granted. Nevertheless, this Court is of the further opinion that the more preferable administration of justice dictates a denial of the motion of the third-party defendant to dismiss the third-party complaint. Should the issues presented in the third-party action be resolved finally in favor of the position of the third-party defendant, no great harm will have been done any parties to this action by such denial. Conversely, if such issues are resolved in favor of the contention of the third-party plaintiff, additional litigation is indicated if the motion under consideration is sustained.

There is respectable authority provided by two district courts in Tennessee, within the Sixth Circuit, for the proposition that the United States has a right of action

herein against the third-party defendant. For the sake of uniformity, this Court, having expressed a dissenting view, will adopt the contrary rulings of District Judges Brown and Wilson, supra. Cf. Young v. Railway Express Agency, Inc., D.C.Ky. (1962), 209 F.Supp. 953.

All relief being denied the third-party defendant, the clerk will forthwith prepare, sign and enter a judgment overruling the motion to dismiss the third-party complaint.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 816

GOVERNMENT EMPLOYEES INSURANCE CO., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner issued an automobile liability insurance policy upon a privately owned vehicle to a government employee who was subsequently involved in an automobile collision while using his automobile in the scope of his employment. Suit was brought by the other party to the collision against the United States under the Federal Tort Claims Act (28 U.S.C. 1346(b)) and the Government Drivers Law (28 U.S.C. 2679). After formally tendering defense of the suit to petitioner (who denied any obligation to defend), the government impleaded petitioner as a third-party defendant on the ground that the policy defined the term "insured" to include "any person or organization legally responsible for the use [of the auto-

798-590—66

mobile]," and the United States was so responsible under the applicable federal statutes. The claim against the United States was subsequently compromised by agreement of all parties (including petitioner) (R. 16), and the district court awarded judgment for the United States against petitioner on its third-party complaint (R. 13–14). The court of appeals affirmed on the ground that the United States was entitled to the benefits of the policy because it was included in the policy's definition of "insured" (Pet. App. 23–29; 349 F. 2d 83).

The decision below does not warrant review by this Court since it involves only the interpretation of the particular insurance contract at issue. The fact that the same definition may be commonly used in the trade as a so-called "omnibus clause" does not render its construction a substantial federal question requiring consideration by this Court. Petitioner and other insurers may, if they choose, avoid such liability in the future by doing as the court of appeals suggested (Pet. App. 28) and appropriately amending the clause.[1]

---

[1] Petitioner is wrong in maintaining (Pet. 16–18) that State financial responsibility laws would bar amendment of the clause at issue here. Those statutes require only that those who operate the insured vehicle be adequately covered, not that the insurance extend to persons who are vicariously liable. In any event, the statutes are designed to assure that someone will be financially responsible for injuries caused by the insured vehicle. They would not be violated by an endorsement excluding the United States from coverage wherever Congress has provided that the United States shall be responsible for such damage. See *Jenkins* v. *Mayflower Insurance Exchange*, 93 Ariz. 287, 380 P. 2d 145, 147. In *Myers* v. *United States*, 241 F. Supp. 515, 519 (N.D. Tex.), upon which petitioner mis-

In any event, the decision of the court of appeals was correct. The Government Drivers Law, 28 U.S.C. 2679, neither expressly nor impliedly deprives the United States of any rights it has to recover over against third parties who may be liable in tort or contract. In the present case, petitioner assumed a contractual obligation to "any person or organization legally responsible" for the automobile's use, and, under a consistent course of decisions, the United States, as employer of the automobile operator, qualifies under those terms. See *Rowley* v. *United States*, 140 F. Supp. 295 (D. Utah); *Prom* v. *United States*, 148 F. Supp. 25 (D. S.D.); *Nistendirk* v. *McGee*, 225 F. Supp. 881 (W.D. Mo.); *Nistendirk* v. *United States*, 225 F. Supp. 884 (W.D. Mo.); *Vaughn* v. *United States*, 225 F. Supp. 890 (W.D. Tenn.); *Gahagan* v. *State Farm Mutual Automobile Ins. Co.*, 233 F. Supp. 171 (W.D. La.); *Patterson* v. *United States*, 233 F. Supp. 447 (E.D. Tenn.); *Barker* v. *United States*, 233 F. Supp. 455 (N.D. Ga.); *McCrary* v. *United States*, 235 F. Supp. 33 (E.D. Tenn.).[2] The claim

takenly relies, the United States was held not to be an additional insured because the policy did not cover business driving.

[2] In *McCrary*, which appears at Pet. App. 37–47, the district court disagreed with the earlier decisions but nevertheless followed them "[f]or the sake of uniformity." The other cases relied upon by petitioner—*United States* v. *Gilman*, 347 U.S. 507; *Uptagrafft* v. *United States*, 315 F. 2d 200 (C.A. 4), certiorari denied, 375 U.S. 818; and *Perez* v. *United States*, 218 F. Supp. 571 (S.D. N.Y.)—do not support its position. *Gilman* held that the United States was not entitled to indemnification from an employee whose conduct had given rise to liability under the Tort Claims Act. *Uptagrafft* held that an employee and his insurer were not entitled to indemnifica-

that petitioner was deprived by government participation of its right to control the litigation is patently unsound when, as here, it rejected the request of the United States that it direct the litigation.

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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JANUARY 1966.

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tion from the United States. *Perez* held that the Government Drivers Law barred all suits against the employee, not merely those which duplicated actions in other jurisdictions.

U.S. GOVERNMENT PRINTING OFFICE: 1966

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Office-Supreme Court, U.S.
FILED
JAN 19 1966
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 816

GOVERNMENT EMPLOYEES INSURANCE COMPANY, *Petitioner*

vs.

UNITED STATES OF AMERICA, *Respondent*

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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OCTOBER TERM, 1965

No. 816

GOVERNMENT EMPLOYEES INSURANCE COMPANY, *Petitioner*

vs.

UNITED STATES OF AMERICA, *Respondent*

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

Respondent's brief, or Memorandum in Opposition to the Petition for Writ of Certiorari, is pregnant with things unsaid. It amounts to an agreement that this Court should review this case.

Rule 24 of the rules of this Court provides:

> "• • • Respondent shall • • • file • • • an opposing brief disclosing any matter or ground why the cause should not be reviewed by this Court. • • •"

As reasons for our Petition we set forth certain constitutional questions; conflicts with the principles annunciated

by this and other courts; the intent of the Congress; the novelty of the question because it has not been decided; the importance and widespread effects of the decision upon thousands of persons and on the orderly administration of justice; the violation of the statutory law of many states and the public interest. None of these reasons has been challenged by the Respondent, nor has the Respondent stated any other "matter or ground why the cause should not be reviewed by this Court". This is understandable because it should be of importance and relief to the Department of Justice to have a determination of this question in view of the hundreds of cases now pending and which will arise unless this Court takes jurisdiction.

The Respondent did make a few arguments on the merits of the case and in so doing made a serious mistake.

The brief says:

> "The claim against the U. S. was subsequently compromised by agreement of all the parties (including Petitioner) (R. 16),"

This is not true. The Petitioner was not a party to the action of the injured plaintiffs and intervenors versus the U. S. The U. S. assumed liability to the plaintiffs and the attorneys Harris (Asst. U. S. Attorney) and Murphy (for the plaintiff) agreed on a compromise settlement and judgment. This was done without the oral or written agreement of the Petitioner. That is confirmed by Mr. Harris' statement that the compromise was done merely with the knowledge of Mr. Tharp, but there is no suggestion of an agreement. (R. 16). Then:

> "THE COURT: (Addressing Mr. Tharp representing

the Petitioner) 'You are reserving your rights on your defense to the third party complaint against the government, is that correct?'

"MR. THARP: That is correct, yes sir." (R. 17)

There is a substantial federal question as to whether or not the U. S. may recover a judgment under an insurance policy with a standard form of omnibus clause found in practically all of the policies of automobile liability insurance issued to government employees covering the use of their private automobiles. This question has arisen, and will arise, in hundreds of cases under the present state of the law. Consequently, this Court's decision involves much more than the mere interpretation of a particular insurance contract as stated by the Respondent.

The Federal Tort Claims Act says the United States is liable for an employee's negligence if a private person would be liable under these circumstances, and it is liable to the same extent as a private individual would be under like circumstances. A private person who becomes an additional insured by virtue of the "omnibus clause" may not recover a judgment under some other named insured's insurance unless he complies with the terms and the conditions precedent to a recovery as set forth in the policy.

QUESTION: May the U. S. obtain a judgment over against an insurance company that issued a personal insurance policy to an employee if the U. S. cannot and does not comply with the terms as conditions precedent to a recovery by a private person?

The Respondent's brief begs the question or ignores it, and states that the elimination of or an amendment to

the omnibus clause is the way to exclude liability to the U. S. If this were done, it would violate the statutory law of most of the states which require such a clause to be a part of every automobile liability policy. Also, if that clause were expunged, those statutes say that the statutory provisions extending coverage to a person liable for the use of the automobile would continue to be an integral part of the policy of insurance.

The brief says the statutes do not deprive the United States of the right to recover from parties who may be liable in tort or contract. The Tort Claims Act makes the United States *exclusively* liable for any loss resulting from a government employee's negligence. The right to recover under an employee's personal insurance policy is contrary to the intent of the Congress and the principles of *U. S. vs. Gilman*, 347, U. S. 407, and other cases. In view of that decision and the investigation of liability insurance by the Congress, it was not intended that the United States should have a right over against an insurance company. But, even so, the Congress would have been constitutionally powerless to grant the Respondent the right to a judgment under another's private contract, without compliance with the terms of that contract. The Congress may not change or destroy the terms and conditions of a written contract between an insured and an insuror. The terms and conditions of a private contract between an automobile owner and an insuror are valuable property rights. Their elimination or destruction to permit the United States to recover a judgment against an insurance company is the taking of property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

A reading of the cases cited should make it evident that review by this Court is imperative. Those cases are incomplete in the consideration of all the terms of a standard policy of insurance, and, for the most part, merely consider one clause, namely the "omnibus clause," but do not impose any responsibility on the U. S. to comply with the terms of the policy as would be required of any private person who became a third party beneficiary of some other party's contract of insurance.

The Respondent makes a surprising claim that the Petitioner rejected the request of the United States that it direct the litigation. The Federal Tort Claims Act and 28 U.S.C., Section 507, provide:

S 507. Duties; supervision by Attorney General.

"(a) Except as otherwise provided by law, it shall be the duty of each United States Attorney, within his district, to: * * *

"(2) Prosecute or defend, for the government, all civil actions, suits or proceedings in which the United States is concerned; * * *

"(b) The Attorney General shall have supervision over all litigation to which the United States or any agency thereof is a party, * * *"

The Tort Claims Act also provides that only the Attorney General may enter into a compromise arrangement. The latter certainly could not delegate any authority to the Petitioner or its attorneys and the suggested supervision by the Petitioner would be nothing more than that of an observer and certainly that is not in compliance with the contract provisions of the insurance policy.

We believe that it is urgent and important that this Court determine the questions presented in the Petition.

January, 1966

Respectfully submitted,

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Office-Supreme Court, U.S.
FILED
FEB 17 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1965

No. 816

GOVERNMENT EMPLOYEES INSURANCE COMPANY,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

BRIEF AMICUS CURIAE IN SUPPORT OF PETTITION FOR REHEARING FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE 10TH CIRCUIT

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IN THE

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GOVERNMENT EMPLOYEES INSURANCE COMPANY,

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UNITED STATES OF AMERICA,

Respondent

BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR REHEARING FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE 10TH CIRCUIT

I. REASONS FOR THE PETITION

1. 5th and 7th Amendments

Petitioner contends that it has been denied 5th and 7th Amendment rights in that its property has been taken without due process and without jury trial.

2. 14th Amendment

National Rural Letter Carriers' Association, as *amicus curiae* in support of the Petition, contends that thousands of rural letter carriers would be deprived of the equal protection of state laws in relation to federal law.

3. Extensive Litigation

Numerous cases have been litigated in the United States District Courts involving the issues herein. One is now on appeal to the United States Court of Appeals for the 5th Circuit.[1] Many more cases will arise if the decision below is sustained because one question presented herein — the requirements of applicable state statutes – would have to be litigated in each state, territory and the District of Columbia.

4. Conflict of Appellate Decisions

The decision herein conflicts with that of this Court in *United States v. Gilman*, 347 U.S. 507 (1953).

5. Intent of Congress

Congressional intent is misconstrued by the decision below.

6. Public Interest

In addition to the broad interests of the insurance industry, set forth in the Petition, 37,500 individuals belonging to one association and an uncounted number of unaffiliated persons and persons belonging to other associations are directly and adversely affected by the decision below.

This Brief sets forth the interest of the *amicus curiae*, the purpose of the Government Drivers Law, the impossibility of the Solicitor General's solution, the hardship to citizens and an equal protection of the laws problem. This Brief merely notes that the decision below is contrary to that in *Gilman, supra*, the matter having been fully argued in the Petition.

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[1] *United States v. Myers et al*, #22830.

II. INTEREST OF THE AMICUS CURIAE

1. National Rural Letter Carriers' Association

The National Rural Letter Carriers' Association is *amicus curiae* herein in support of Appellant's Petition for issuance of a Writ of Certiorari.

The National Rural Letter Carriers' Association (hereinafter, "NRLCA") has 43,000 members, of whom 29,500 are regular Post Office Department (hereinafter, "POD") rural letter carriers, 5,500 are retired POD rural carriers and 8,000 are substitute POD rural letter carriers. Of its membership of 43,000 individuals, a total of 37,500 individuals serve as POD rural letter carriers. Some 92% of all regular POD rural letter carriers belong to NRLCA. NRLCA properly and authoritatively represents the interests and views of its members.

2. The Individual POD Rural Letter Carrier

The Government Drivers Law, 28 USC § 3679, directly affects the livelihood of NRLCA members, on whose behalf NRLCA files this Brief *amicus*.

POD rural letter carriers deliver mail to assigned rural mail boxes. They use privately owned motor vehicles for this purpose. Although they are POD employees performing an assigned job on behalf of the Government, the Government does not furnish them motor vehicles. Most rural letter carriers own two or more motor vehicles, only one of which at any given time is used for delivery of the mail but any or all of which may be used from time to time for such delivery. POD furnishes no liability or other motor vehicle insurance for such vehicles when they are used in the scope of POD employment or otherwise.

The individual rural letter carrier must bear the full expense of providing and operating a motor vehicle.[2] He is required to have a vehicle available at all times. Consequently, he must have ready access to a substitute vehicle for use should his primary vehicle become inoperative. The state of the art of motor vehicle construction and maintenance, one may note, is such that any motor vehicle undergoing heavy and continual use, often over poor roads and in all types of weather, from time to time will be inoperative.

Some rural letter carriers engage in business other than that of rural letter carrier. Sometimes use of one's motor vehicle is required in pursuit of such additional business. A large number of rural letter carriers live on farms[3] and at the least use one or more of their motor vehicles in operating such farms. Even when a letter carrier is engaged in an occupation in addition to mail delivery (other than farming),[4] only one of his vehicles is rated Class III[5] and such rating covers occupational

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[2] The letter carrier's expense for each car used in, or alternatively, available for, mail delivery includes purchase or rental (usually the former), replacement and/or repair, licensing, insurance and maintenance. The rural letter carrier receives an allowance based upon route length, days of operation and route conditions. This allowance includes neither a direct figure for liability insurance nor one for a substitute vehicle.

[3] The overwhelming majority of all rural letter carriers are rated Class IAF by liability insurance companies, meaning that the insured carrier lives on what the insurance industry considers a farm and not necessarily meaning that the insured carrier is regarded as a farmer. The distinction is not relevant herein.

[4] NRLCA believes that relatively few carriers engage their motor vehicles in occupations other than mail delivery and farming, the large number being solely POD rural letter carriers.

[5] Applicable insurance ratings are Class IA - motor vehicle normally is not used in scope of his employment; Class IAF - same but situs of insured's residence is a farm; Class III -

[*Continued, next page*]

use of the vehicle for such occupation other than mail delivery or farming.

3. The Government Drivers Law

The role of the individual rural letter carrier as a possible defendant in a civil tort action and as an insured who must pay liability insurance premiums is of vital importance to NRLCA, to the rural letter carrier and to POD.

Prior to enactment of the Government Drivers Law, an aggrieved individual could sue the United States pursuant to the Federal Tort Claims Act, 28 USC § 1346(b), on account of the letter carrier's alleged negligence in the scope of his employment in delivering the mail. Alternatively or additionally, the aggrieved individual could sue the letter carrier in the appropriate state court.

Since enactment of the Government Drivers Law, an aggrieved individual may sue only the United States and if such individual sues a person coming within the scope of the Law, upon motion of the Attorney General, such action is removed to the appropriate United States District Court and the United States is substituted as a party defendant. As Petitioner has noted fully, the Attorney General then assumes control of the litigation and there is no provision in a statute or in the Federal Rules of Civil Procedure authorizing the Attorney General to relinquish defense of the action to attorneys for the insured's liability insurance company.[6]

[*Fn.* 5, *cont'd*]
motor vehicle is used in scope of employment and insurance company may be liable if insured is negligent in the scope of his employment.

[6] As set out *in extenso* in the Petition, the liability insurance company not only loses control of the litigation but also loses the right to trial by jury and runs the risk that the Attorney General, having decided the accident occurred in the scope of the insured's POD employment, is free thereafter to reverse

[*Cont'd, next page*]

4. The Individual Letter Carrier as Defendant

Thus, the letter carrier is nominally relieved of the burden of the role of defendant in a tort action. As is explained *infra*,[7] such relief is wholly illusory if the rationale of the Court of Appeals for the 10th Circuit and of the Solicitor General herein is to prevail.

5. The Individual Letter Carrier as Insured

If the individual letter carrier must insure only himself and those using his motor vehicles, he saves substantially on his insurance premium. If he must insure every party which may be held liable vicariously for his negligence and also the United States, he not only saves no premium, but as is set forth *infra*,[8] must pay a staggeringly larger premium than he would have paid prior to March 21, 1962, the date the Government Drivers Law became effective.

The merits of NRLCA's arguments aside, it is obvious that if the letter carrier saves no premium as a consequence of the Government Drivers Law or, worse yet, must pay an increased premium or become uninsurable, the letter carrier has gained nothing from the Government Drivers Law, for clearly his duties and his nuisance burden as a witness, as a likely deponent and as one otherwise integrally and principally involved in litigation do not diminish. Indeed, the letter carrier gains nothing except

[*Fn.* 6, *cont'd*]
his decision, remanding the defense to attorneys for the insurance company at a point in time when they may have lost evidentiary and/or negotiation opportunities. NRLCA concurs in the 5th and 7th Amendment objections raised to this procedure and argued in the Petition. However, neither NRLCA's interest nor its argument herein is predicated upon these grounds, both of which, while considered viable, relate to the constitutional rights of the insurance company only.

[7] Part IV, § 4; Part V.

[8] Part V, § 2.

in the rare case in which the final judgment might otherwise have been in excess of maximum liability coverage.

The significance of the foregoing is set forth *infra*.[9]

III. THE PURPOSE OF THE GOVERNMENT DRIVERS LAW

1. Intent of NRLCA

The intent of NRLCA, as one of several organizations and federal agencies sponsoring the Government Drivers Law, was a goal of complete protection for the letter carrier — real and not illusory immunity from suit.

Specifically, NRLCA intended that the Government Drivers Law should provide maximum practical benefit to the government driver. As a trade association attempting conscientiously to fulfill the needs of its members, NRLCA would not have advocated a change in the law which would have rendered NRLCA members uninsurable or which would have resulted in a staggering increase in liability insurance premiums. In its testimony[10], NRLCA stated, in pertinent part, that: "such liabilities resulting from the operation of a motor vehicle by an employee are, in our opinion, a just and proper responsibility of the employer — the United States Government."

That NRLCA would have intended Congress to enact a statute which would render NRLCA members uninsurable or which would substantially increase their liability insurance premiums is untenable as contrary to legislative history and contrary to logic.

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[9] Part V.

[10] Statement of Mr. Charles R. Larson, President, NRLCA, before House Judiciary Subcommittee #2, on HR 3283, 87th Congress, a companion bill.

2. Intent of Sponsoring Federal Agencies

The Department of Justice, the Department of Defense, the Post Office Department, the General Services Administration and the National Aeronautics and Space Administration joined in sponsoring the Government Drivers Law. These agencies supported HR 7577, 86th Congress, 2d Session, which was vetoed by the President for reasons not here relevant.[11] They then supported HR 2883, 87th Congress, 1st Session, which was enacted without the debilitating Senate amendment.

Congress considered providing for purchase at the Government's expense of commercial liability insurance but took the view, as expressed by GSA in its Speaker Letter, that ". . . procurement by the Government of liability insurance would entail substantial and needless expense. . . ."[12]

Thus, Congress was specifically introduced to the mode of commercial liability insurance. It rejected that mode.

Congress was also specifically introduced to another approach involving commerical liability insurance, namely, the funding of such insurance by the letter carrier. GSA pointed out appropriately:

> "The enactment of this amendment for the protection of the Government driver would afford the relief desired by him, for there would be *then no point in his spending his own funds to take out liability insurance*

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[11] HR 7577, as amended by the Senate, required the consent of the plaintiff before the action could be removed to the United States District Court. President Eisenhower vetoed the Act, because, *inter alia*, the Senate Amendment would ". . . prevent the conversion of the action to one under the Federal Tort Claims Act and thus thwart the sound purpose of the original Bill." US Code Cong & Ad News, p. 2797.

[12] 1961 US Code Cong & Ad News, p. 1449 *et seq*, letter from GSA Administrator Franklin Floete to Speaker Sam Rayburn. Set forth in full in Senate Report #736, 87th Congress, 1st Session, p. 6 *et seq*.

to protect him while operating motor vehicles in the scope of his employment for the Government." (Italics supplied)[13]

After considering imposition upon the driver of the cost of commercial liability insurance, Congress concluded that it desired ". . . to protect the Government driver from the ever-present danger of personal liability and [*to*] *relieve him of the expense of supplying private liability insurance."*[14] Congress obviously intended the liability of the United States to be predicated upon a statute and not upon a driver's personal liability insurance. The rationale of Congress is not dissimilar from that which this Court recognized with regard to the Federal Tort Claims Act in slightly different context.[15]

The legislative history shows Congress had only one precedent cited to it, namely, the exclusive remedy doctrine of the Suits in Admiralty Act, 46 USC § 745. NRLCA knows of no case in which the United States has sought indemnity over against an insurance company pursuant to the Suits in Admiralty Act.

3. Intent of Congress

There is nothing in the legislative history to indicate that Congress even considered allowing the United States indemnity over against the insured's commerical liability

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[13] *Ibid.*

[14] *Ibid.* Statement of purpose favorably quoted in *Uptagrafft v. United States*, 315 F.2d 200, 204 (USCA, 4th Cir, 1963).

[15] *United States v. Gilman*, 347 U.S. 507, 510 (1953). ". . . we deal only with a rule of indemnity which is utterly independent of any underwriting of liability." *Per* Mr. Justice Douglas. In *Gilman*, this Court denied the United States indemnity over against the individual tortfeasor employee, holding the Federal Tort Claims Act did not allow it. Indemnity over against the employee's insurance company is no different. The ultimate burden either way would fall upon the letter carrier.

insurance company. It is obvious that, considering Congress' concern that the individual driver would not have to pay insurance rates to cover his scope of employment insurance, Congress cannot be assumed to have legislated an indemnity right on the one hand (for which only the individual driver could pay) while legislating an exclusive premium-free remedy against the United States on the other hand.

This Court must assume Congress spoke in 1961 to the state of the law as it then existed. The state of the law at that time included the holding of this Court in *Gilman*. If one reads *Gilman* as holding that this Court cannot fashion a rule whereby the United States is indemnified if the driver carries liability insurance but is not indemnified if the driver does not carry it — and there is no other way to read *Gilman* — then this Court would not want to assume that Congress by inarticulate phraseology or mysteriously meaningful silence created a right of indemnity over by the terms of the Government Drivers Law which is otherwise unknown to the Federal Tort Claims Act.

The Federal Tort Claims Act speaks only to actions in tort. Counterclaim and related jurisdiction pursuant to the Federal Tort Claims Act as set forth in 28 USC § 2679 is at most no extension of the counterclaim and related jurisdiction of the United States pursuant to 28 USC § 1346 (c). Application of the latter is limited to ". . . jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this Section." If Congress wanted to give the United States the right of indemnity over pursuant to the Government Drivers Law, Congress would not have limited the Federal Tort Claims Act to torts and limited 28 USC § 2679 thereof to the requirements of 28 USC § 1346(b). In view of the broader and pre-existing language of Rule 14(a), Federal Rules of Civil Procedure, if Congress wanted to afford the United States the broad indemnity rights the Solicitor General

now claims, it could have done so by appropriate phraseology or perhaps just by silence.

This Court would want to interpret the intent of Congress, considering there is no contrary manifestation, to be consistent with the intent of the sponsors of the Government Drivers Law. That intent is clear — complete protection for the individual driver.

This Court does not attempt to read a legislative enactment as one might query the Delphic Oracle. If the view of the Court of Appeals for the 10th Circuit were properly to be sustained, somewhere in statutory language or in legislative history the right of indemnity would be prescribed or implied. It is neither.

IV. THE SOLICITOR GENERAL'S IMPOSSIBLE SOLUTION

1. Revision of the Omnibus Clause

The Solicitor General suggests that "Petitioner and other insurers may, if they choose, avoid such liability [for indemnity . . . by . . . amending the [omnibus] clause." [16] Thereby the Solicitor General is able to claim that the decision below ". . . involves only the interpretation of the particular insurance contract at issue." [17]

The fact is every government driver's liability insurance policy is affected by the decision below and there is no means whereby these policies can be rewritten to prevent exercise of the right of indemnity over which the Court of Appeals herein says exists.

2. Requirements of the States

Every State and the District of Columbia have some kind of compulsory automobile insurance law [18] or finan-

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[16] Memorandum for the United States in Opposition, p. 2.

[17] *Ibid.*

[18] Maryland, Massachusetts, New York, North Carolina, Virginia.

cial responsibility law. These laws leave little or no leeway as to what an insurance company may say in an insurance policy. The Solicitor General's terse characterization of these laws as not "excluding the United States from coverage wherever Congress has provided that the United States shall be responsible for such damage" is without support. State laws do not permit deviations from required terminology. Even when state regulatory bodies have authorized deviations, such authorization has been struck down by the Courts.

In *Landis v. New Amsterdam Casualty Company*, 347 Ill. App. 560, 107 N.E. 2d 187, 190-191 (1952), involving a garage liability policy without a required omnibus clause, the Appellate Court of Illinois, 4th District, pertinently stated:

> "The fact that the [Illinois Motor Vehicle Financial Responsibility] Statute requires the inclusion of an omnibus clause in a liability insurance policy makes such inclusion mandatory and the provision will be read into the policy . . ."

The Supreme Court of New Jersey ruled similarly in *Saffore v. Atlantic Casualty Insurance Company*, 121 A.2d 543 (1956), involving a policy which included a named insured only. [19]

In *Merchants Mutual Casualty Company v. Capobianco et al*, 123 A.2d 159 (1956), the Supreme Court of New Hampshire held that the required minimum statutory limits must be read into the policy.

In *Standard Accident Insurance Company v. New Amsterdam Casualty Company*, 249 F.2d 847 (USCA, 7th Cir, 1957); in *(American) Lumbermen's Mutual Casualty Company of Illinois v. Timms and Howard, Inc.*, 108 F.2d 497 (USCA, 2d Cir, 1940); and in *Newton v. Employers Liabil-*

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[19] ". . . The insurer could refuse to enter into the contract of insurance required by the statute; but, having undertaken to give liability insurance coverage, the statutory terms [sic] become a constituent element of the contract . . ." *Op cit*, p. 548.

ity Assurance Corporation, 107 F.2d 164 (USCA, 4th Cir, 1939), cert. den., 309 U.S. 673; Illinois, New York and Virginia statutes requiring omnibus clauses were enforced notwithstanding contrary or inconsistent language of the insurance policies. In *Newton*, the Virginia Bureau of Insurance had specifically authorized language deviating from the omnibus clause.

Courts have consistently held that insurance policies are affected with a public interest and that, therefore, mandatory statutory provisions are to be enforced.[20]

It would be superfluous to set forth *verbatim et literatim* the provisions of said laws which require an omnibus clause without the kind of exclusion the Solicitor General suggests or which require financial responsibility proof incompatible with that suggestion. A few citations might be helpful.[21]

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[20] *Travelers Insurance Company v. Caldwell*, 133 F.2d 649 (USCA, 8th Cir, 1943), cert. den., 320 U.S. 736 — absence of required endorsement in application for common carrier certificate (Arkansas); *American Alliance Insurance Company v. Brady Transfer & Storage Company*, 101 F.2d 144 (USCA, 8th Cir, 1939) — requirement of motor carriers liability (Iowa); *Marriott et al v. National Mutual Casualty Company et al*, 195 F.2d 462 (USCA, 8th Cir, 1952) — liability insurance for carriers (Kansas); *Inland Mutual Insurance Company v. Stallings et al*, 263 F.2d 852 (USCA, 4th Cir, 1959) — proof of financial responsibility pursuant to Financial Responsibility Law (Maryland); *Kelly v. Capital Insurance & Surety Company*, 241 F. Supp. 605 (USDC, Guam, 1965) — Guam Financial Responsibility Law.

[21] Alabama (all references are to State Codes) - § 74(62)(a), (b)2. Alaska - § 46(1), (2)(b). Arizona - § 28-1170A, B2; see *Jenkins v. Mayflower Insurance Exchange*, 93 Ariz. 287, 380 P.2d 145 (1963). Arkansas - § 75-1466a, b2. California - § 11580.1; see *Wildman v. Government Employees Insurance Company*, 448 Cal. 2d 31, 307 P.2d 359 (1957); § 11580.1(d), §§ 16450-16452. Colorado - § 13-7-22(1) (a), (c). Delaware - §2904(a), (b) (2). District of Columbia - § 40-473(a), (b)2. Hawaii - § 160-103(b). Idaho - § 49-1521(a), (b)2. Illinois - § 7-317(a), (b)2. Iowa - § 321A.21.1, 2.b. Kansas - § 8-750(a) (2).

[*Cont'd, next page*]

3. Requirements of the Department of Defense

The Department of Defense also has a regulation (1) requiring adherence to minima in applicable state laws and (2) forbidding ". . . unusual limitations or restrictions including . . . coverage limited to exclude liability . . . if such liability exists as a matter of law."[22]

The validity of this regulation has been sustained. *Royal Standard Insurance Company v. McNamara*, 344 F.2d 240 (USCA, 8th Cir, 1965).[23]

4. Absence of a Solution

As the foregoing illustrates, the suggestion of the Solicitor General is unworkable. State laws and the DOD regulation do not permit exclusions in omnibus clauses

[*Fn.* 21, *cont'd*]

Kentucky - § 187.490(1), (2) (b). Louisiana - § 900A, B(2). Maryland - § 131-131(a) (3). Michigan - § 257.520(a), (b)2. Minnesota - § 170.40, Subdivision 1, 2(2). Mississippi - § 8285-21(a), (b)2. Missouri - § 303.190.1, 2(2). Montana - § 53-438(a), (b) 2. Nebraska - § 60.534 (2). Nevada - § 485.3091-1, 2(b). New Jersey - § 39:6-46, (a). New Mexico - § 64-24-87(a), (b)(2). New York - § 345(a), (b) (2). North Carolina - § 820-279.21(a), (b)2. North Dakota - § 39-16-20.1, 2b. Ohio - § 4509-51(B). Oklahoma - § 7-324(a), (b)2. Pennsylvania - § 1421(a), (b) (2). Rhode Island - § 31-32-24(a), (b) (2). South Carolina - § 46-702(7). South Dakota - § 44.03A51 (1), (2) (b). Tennessee - § 59-1223a, b(2). Texas - § 21(a), (b)2. Virginia - § 38.1 - 381(a); see *Maryland Casualty Company v. Burley et al*, 345 F.2d 138 (1965), § 46.1-504(b), (c), § 46.29.290(1), (2) (b). West Virginia - § 12(a), (b) (2). Wisconsin - § 204.30(1), (3), § 344.33(1), (2) (c). Wyoming - § 31-306(a), (b)2.

[22] DOD Directive #1344.6 (April 15, 1964), § B.3.d of unnumbered section "INSURERS, AGENTS AND INSURANCE POLICIES."

[23] ". . . a motor vehicle liability insurance policy meets the requirements if it . . . (4) *does not contain* unusual limitations including, but not limited to . . . (b) *coverage limitations which exclude liability for bodily injury to passengers and guests if such liability exists as a matter of law.*" *Royal Standard*, *op cit*, p. 241. (Italics partially supplied.)

and/or in insurance policies conditioned to meet the requirements of financial responsibility laws.

Perhaps it was with the foregoing in mind as it related specifically to Massachusetts that the Boston Regional Office, POD, on May 13, 1965 advised all appropriate POD officials in the Boston Region,[24] *inter alia*, that "*if we all use our P.O.A. (privately owned automobile) with any regularity on postal business, we must have business coverage if we expect to be protected by our policy.*"[25]

Thus, it is seen that as a matter of law the insurance companies cannot protect the letter carriers by doing as the Solicitor General suggests.

5. Inconsistency Within the Government

Apart from the legal impossibility of the Solicitor General's suggested solution, the Government itself in practice does not recognize such solution.

On June 28, 1965, the United States Attorney for the District of Minnesota filed the Complaint in CA #2-65-184, *United States v. National Insurance Underwriters*. In that Complaint, the United States seeks indemnity over against Defendant as a consequence of an award which the United States administratively paid to the damaged party. The Complaint ignores the fact that the insurance policy carries the very exclusion which the Solicitor General

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[24] Which includes all New England.

[25] Memorandum, Special Assistant for Employee Relations, Boston Regional Office, POD, May 13, 1965, to State Representative, Division Directors, Regional Representatives - Employee Organizations, subject: "Insurance When Using Private Cars on Postal Business in Massachusetts."

suggests.[26] Defendant's Answer, of course, raises this defense.[27]

To NRLCA and to insurance companies with which its members deal, it is obvious that the Government as a party litigant intends to enforce its alleged right of indemnity over regardless of endorsements which might stand the test of state statutory requirements and regardless of the Solicitor General's suggestion. NRLCA seeks to protect its members against the realities of the Government as a party litigant.

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[26] The exclusionary endorsement therein reads as follows: "This policy does not apply under liability coverage to the United States of America or any of its agencies." The more customary exclusionary endorsement reads as follows: "It is agreed that the policy does not apply under the liability coverages to the following as insureds: (1) The United States of America or any of its agencies; (2) Any person including the named insured, with respect to bodily injury or property damage resulting from the operation of an automobile by such person as an employee of the United States Government while acting within the scope of his office or employment, if the provisions of § 2679 of Title 28, United States Code (Federal Tort Claims Act), as amended require the Attorney General of the United States to defend such person in any civil action or proceeding which may be brought for such bodily injury or property damage, whether or not the incident out of which such bodily injury or property damage arose has been reported by or on behalf of such person to the United States or the Attorney General."

[27] Plaintiff apparently intends to raise a preliminary issue that the endorsement is inapplicable, not because it violates Minnesota law, but because the insurance company did not reduce the premium to the insured carrier when it endorsed the policy. If Plaintiff pursues this argument, the inconsistency between its position therein and the Solicitor General's suggestion is equally evident although in a differing vein, for Mr. Nock was rated Class IAF and there is no lower rating, with or without a restrictive endorsement. As is shown *infra*, Part V, the question is not whether a restrictive endorsement lowers a IAF premium but whether liability for indemnity raises a IAF premium.

V. HARDSHIP TO NRLCA MEMBERS

1. Rate Differential - Business and Non-Business Use

If one assumes there is legal merit to the Solicitor General's suggestion, one still finds no practical merit to it because the individual letter carrier is hurt by necessary rate differentials.

The case at bar arose in New Mexico. For this reason some New Mexico statistics are cited.

In each of New Mexico's two territories, the Class III rate is 151% of the Class IA rate. In one territory, the Class III rate is 212.5% of the Class IAF rate. In the other territory, it is 208.3%. These figures are reported by the National Bureau of Casualty Underwriters, largest automobile rating bureau in the United States.

California and Texas are states with large areas, large rural populations and large numbers of rural letter carriers.

Of 50 territories in California, two are picked at random. In one, the Class III rate is 151% of the Class IA rate, 214% of the Class IAF rate. In the other, the Class III rate is 150% of the Class IA rate, 215% of the Class IAF rate.

There are 26 territories in Texas. Rates are statutory. In one territory, the Class III rate is 169.6% of the Class IA rate, 226% of the Class IAF rate. In another, the Class III rate is 171% of the Class IA rate, 231% of the Class IAF rate.

From the foregoing rate differentials, one recognizes that the letter carrier would have to pay a substantially higher rate if his insurance company were required to rate him Class III rather than Class IA or the more common Class IAF.

2. Rate Differential - Business Use by Court of Appeals Rationale and Non-Business Use

The rationale of the decision below is that there is the right of indemnity over by the United States against the insurance company even though the Attorney General (1) must defend the suit, (2) has complete control of the litigation, (3) has authority to settle claims administratively without judicial consent, (4) must litigate in the federal judiciary and (5) cannot have a jury trial — all in violation of the standard insurance contract provisions retaining all these rights and liabilities in the insurance company. This, of course, is what gives rise to Petitioner's well-taken argument that the decision below violates Petitioner's rights under the 5th and 7th Amendments.

As far as the letter carrier is concerned, constitutional academics are less important than money. One of Petitioner's experienced underwriting officers informally estimates that the average premium to a letter carrier would have to be increased 300% if the decision below were to be sustained and if, as contended *supra*, states were not to permit exclusionary endorsements. This comes about, NRLCA is told, because the practices of the United States and all private insurance companies are so vastly different in the handling of claims, both administratively and judicially. Among other things, insurance companies often settle many claims shortly after an accident — obviously in a sum much smaller than the same injured party might receive months or years thereafter. The federal agencies have neither facilities, internal authority nor disposition to handle claims in this manner.

Regardless of the reasons supporting an estimated 300% figure, the fact is that most letter carriers would become *uninsurable* because most letter carriers could not profitably operate their routes if they had to pay such dear premiums. Thus, the letter carriers seek herein to

preserve their livelihood for if they are uninsurable they are unemployable.[28]

VI. EQUAL PROTECTION OF THE LAWS

1. Inconsistency Among the States

A reading of the motor vehicle laws of the various states and an understanding of the rules of the various state motor vehicle regulatory bodies emphasizes the fact that while all states have laws which fly in the face of the Solicitor General's suggestion, the requirements of these laws vary.

The Government Drivers Law is supposed to apply equally to every citizen whose driving activity comes within its purview.

Giving the Solicitor General's suggestion the most generous attribute of plausibility, one can at most conclude that in a few states the letter carrier may find it possible to obtain insurance pursuant to a policy which has the restrictive endorsement. In those states, the letter carrier — the prohibitive premiums aside — might be able to do business. Even within these few states, there would be unequality. For example, Texas and Virginia permit an endorsement excluding the United States if it also excludes the named insured when the named insured is in the scope of his employment. If the courts were to sustain this exclusion,[29] the letter carrier having a separate business could not benefit by the exclusion unless he gave up his separate business.

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[28] This Court is asked to note that if a few letter carriers would not become uninsurable, they still would lose their employment because they are required to have a substitute vehicle available and, whether such substitute vehicle be their own, be rented or be borrowed, somebody would have to provide 300% premium coverage on the substitute vehicle also — a patent impossibility. See Part II, § 2, *supra*.

[29] NRLCA contends they would not. Part IV, § 2, *supra*.

In 37 states, National Insurance Underwriters, which underwriters for Petitioner herein with respect to POD rural letter carriers, is now attempting this type of endorsement. Aside from the poor legal life expectancy of this exclusionary endorsement, the unequal and adverse effect upon the insured is apparent.

South Carolina will not permit an exclusion of the named insured but allows exclusion of the United States when the named insured is in the scope of his employment — the opposite, so to speak, of the Texas and Virginia requirements. Other states require other variations or no variations.

As noted *supra*,[30] a purpose of the Government Drivers Law was to reduce premiums, not to increase them. Congress endorsed GSA's view that purchasing their own business coverage liability insurance "has imposed a heavy financial burden on the large number of such employees whose work entails their driving of motor vehicles on behalf of the Government . . .".[31]

2. Constitutional Litigation

NRLCA contends that these variations, even if insurance could be written, deprive the letter carrier of the equal protection of the applicable state statutes and the Federal Tort Claims Act as amended by the Government Drivers Law, in violation of § 1, 14th Amendment.

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[30] Part II, § 2.

[31] GSA letter, *op cit*, Fn 9, *supra*.

This Court can avoid the vexing volume of litigation which would ensue to test the various state statutes in the context of the Government Drivers Law as interpreted by the decision below simply by interpreting the Government Drivers Law consistent with Congress' intent.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 816

GOVERNMENT EMPLOYEES INSURANCE COMPANY, *Petitioner*

vs.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Petitioner prays this Court grant rehearing of its order of January 31, 1966, denying the Petition for Writ of Certiorari, and that the Writ of Certiorari issue to review the judgment of the Court of Appeals for the Tenth Circuit in the above entitled case as prayed for in the Petition filed December 13, 1965, herein.

Government Employees Insurance Company, Petitioner, filed its Petition for Writ of Certiorari which has been denied by this Court. After the filing of said Petition, National Rural Letter Carriers Association obtained

the consent of both Petitioner and Respondent for the filing of a brief amicus curiae in support of Petitioner's Petition for Writ of Certiorari. Immediately thereafter, counsel for the National Rural Letter Carriers Association, as Petitioner amicus curiae, prepared such a brief, which brief was at the printers on January 31, 1966, on which date this Court denied the Petition for Writ of Certiorari. Said brief amicus curiae has now been tendered for filing with the Clerk of this Court. Petitioner respectfully urges this Court for a rehearing and reconsideration of the Petition for Writ of Certiorari in view of the fact that the brief amicus curiae had not been filed and had not been considered by this Court in its denial of the Petition for Writ of Certiorari. Said brief amicus curiae presents additional reasons which should be considered by this Court on the Petition for Writ of Certiorari and presents for consideration the interest of National Rural Letter Carriers Association in a review by this Court of the problems presented in the Petition.

As stated in the brief of the amicus curiae, the National Rural Letter Carriers Association has some 37,500 individuals who serve as rural letter carriers for the Post Office Department, each of whom drives a motor vehicle in the course of serving as a rural letter carrier for the Post Office Department, and said Association, properly, is interested for its members in the outcome of this case and the constitutional questions and conflict of appellate decisions which have been raised in the Petition for Writ of Certiorari. The amicus curiae brief involves the protection of the Fourteenth Amendment which ground was not raised by petitioner and is available to petitioner. Said brief of the amicus curiae raises additional reasons and arguments why the Petition for Writ of Certiorari should be granted

and points out to this Court why interests other than just those of persons insured by Petitioner, and Petitioner itself, are affected by the decision of this Court herein.

The brief of the amicus curiae, as well as raising additional matters in support of the granting of the Petition for Certiorari, points up the broad public interests involved in this case, and the number of persons affected by it. Petitioners respectfully urge this Court that this matter is worthy of reconsideration and that a rehearing on the Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit should be granted, and the brief of the amicus curiae should be received and considered by this Court as part of the proceedings herein.

February, 1966

Respectfully submitted,

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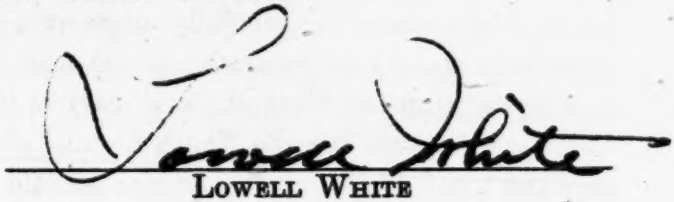
Attorneys for Petitioner

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay and is restricted (as provided in Rule 58 of the rules of this Court) to the grounds that substantial matters are raised in the brief of the amicus curiae, not previously presented to the Court, but which matters are important, available to Petitioner and applicable as grounds for the granting of the Petition for Writ of Certiorari.



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